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Teaching Defense: US Lawyers Teach Afghan Attorneys the Art of Defense

By Leonard Post
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Legal Aid Afghanistan's caseload will spike if the country's first elected president makes good on his December post-inauguration promise a "holy war" against the narcotics industry.

That there is a Legal Aid Afghanistan (LAA) and that its lawyers have been mentored in the art of questioning authority by Western lawyers is a miracle worked by the New York based International Legal Foundation (ILF).

ILF volunteer lawyers, known as fellows, have been coming to Afghanistan for two month stints (soon to be six) since August 2003 to teach experienced Afghan lawyers newly minted public defenders funded by ILF the myriad Western skills of criminal defense

But ILF's director worries that the program is in danger of going broke just when it's needed most. In addition to the promised "drug war," the U.S. Department of Defense may soon turn over some detainees to the Afghan government for prosecution.

Criminal defense is not high on the list of nation builders, asserted Natalie Rea, ILF's unpaid executive director and a staff attorney in the appeals bureau of the Legal Aid Society of New York.

"We learned that the international community never thinks of criminal defense as a natural part of reconstruction, it's an unpleasant constituency," Rea noted. "They think that market forces will fill the void. It's surreal we're talking about indigents, not Michael Milken." (Milken, a wealthy former junk bond trader, was convicted of securities fraud in 1990.)

Seven lawyers staff LAA's Kabul office. The Kunduz office in the north has two lawyers and is adding a third. An office will soon open in the southern city of Kandahar. All the lawyers are Afghans who, with the exception of a couple of recent graduates, went to law school before the Russians came in the 1970s.

"People want to pretend that there's nothing here," Rea said when interviewed in December in her New York loft, which doubles as the foundation's office. "But that's not true. There are many judges and prosecutors here who want to do the right thing to follow the rule of law."

Some of those rules are contained in an interim criminal code that was adopted early last year. It was written primarily by Italian and American officials under the terms of the 2001 Agreement on Provisional Arrangements in Afghanistan Pending the Reestablishment of Permanent Government Institutions, known as the Bonn agreement. That agreement, among other things, established the mechanisms for dividing up rebuilding roles and regions among the international community.

Rea, now back in Afghanistan, will team with just arriving ILF fellow Mary McGowan Davis. Davis is a former chief of the appeals division in the U.S. Attorney's Office for the Eastern District of New York and a former acting justice of the supreme court in Manhattan, a trial level court. This, her third stint, will end in April.

"We're part of building a country," said Davis, a few days before she left for Afghanistan. She sat behind her desk in a windowless office at Legal Momentum from where, as a visiting attorney, she works on the applicability of international law to domestic courts. Davis' work in Afghanistan has brought her "a new zest. It's tremendous, fun, capable, bright, motivated staff the roses and the pomegranates outside (the Kabul office) you don't know what the day will bring," she said. (One day last year brought evacuation from the country for security reasons).

The Kalashnikov Case

Davis described the cases as "running the usual gamut of crimes robbery, murder, fraud, petty thefts, but also alcoholism and adultery." Using an LAA case as an example, she asserted that Afghan clients are not so different from their American counterparts.

"The Kalashnikov [a rifle] was under the bed," said Davis, parroting an LAA client. "And it somehow misfired. Somehow it shot his wife five times. Just like here, there are truly bad guys and there are people who make mistakes."

They've had only one major drug case. "But the major push on counter narcotics has yet to come," Davis said.

LAA lawyers' relatively light caseload – 10 to 15 cases each – has allowed for intensive mentoring. Three other Legal Aid lawyers and private New York criminal defense lawyer, a former executive director of the New Hampshire public defender's office, Michael Skibble, and a London barrister have each come to Kabul with new insights.

"The Afghan lawyers know who the audience is we don't," Rea said. "We just want to give them the tools to adapt our skills to the audience, transfer our skills of analysis."

While the Afghan lawyers were trained at Kabul University or The Shariat, a small Islamic university in Kabul, in a French like civil system, an inquisitorial model, what they hadn't learned was skepticism, Rea explained.

“When they started out they never questioned anything in the file,” Rea said. “If a file said their client was married and the client said no, the assumption was the file was correct. We had to say, there are two versions.”

And they didn’t grasp the concept of independent investigation, Davis said. For example, when a vehicle was stolen from the ministry of foreign affairs and found abandoned, an employee of the ministry was arrested, although he denied involvement.

“We found out they taped the comings and goings [at the ministry],” Davis said. ““We have to get hold of the tape,’ I said. It was a completely new idea to them, the potential for investigation, what that means.” They got the tape and the man was acquitted.

An Ancient Culture

While the country’s modern law is in flux, its customary law is ancient.

Rea thought it critical to understand the culture before proceeding, in part due to a miscalculation she’d made in Rwanda in 1998. With 125,000 prisoners, four international and no Rwandan lawyers, Rea decided it might be best “to do what we do best plea bargain,” she said. “But what we didn’t understand was that a Rwandan would never admit to something just to get a shorter sentence, they would be shunned by the communities that they returned to.”

In 2001, ILF undertook the first ever compilation of the customary laws of Afghanistan, a report researched by Karim Khuram, then a professor at Peshawar, Pakistan’s Afghan University Law School, who now directs LAA’s Kabul office.

According to the report, under customary law, which varies somewhat regionally, for most crimes, tribal courts jirg as award women (for marriage purposes), animals, money and apologies to those who were wronged in proportion to the wrong. The system is generally intended to be restorative as opposed to punitive.

The preparation of the report was initially funded by New York painter Eric Fischl, who also supported Rea’s work in Rwanda. But the Open Society Institute, the hub of the Soros foundations, has provided the bulk of ILF’s funding for LAA\$30,000 for a six month grant that will soon run out and \$80,000 for a one year grant that will begin in April 2005.

The Funding Fight

“We will be facing a very dramatic financial situation if we do not get money by the end of February to carry us to our next Soros grant,” Rea reported in an email.

ILF has a grant request pending with Washington based Management Systems International (MSI), a professional service contractor that has contracts in Afghanistan with the United States Agency for International Development (USAID). But the ILF has been told it has “very little chance,” said Rea. USAID is a federal agency that receives foreign policy guidance from the State Department.

MSI referred all questions regarding the programs to USAID. Inge Fryklund, USAID's Rule of Law Adviser in Afghanistan, stated in an email from Kabul that no money was budgeted for the next three years for direct legal aid anywhere in Afghanistan, because it is not part of USAID's mission, she said.

USAID's focus is on the development "of legal structure court administration, general training of lawyers, judges and prosecutors," she said. USAID had provided an ILF/LAA training grant in the past and partially funded ILF's examination of customary law.

"The international community, the U.S. and U.K. in particular is spending a lot of money on training judges, prosecutors and police for the new anti narcotics project, but we can't get money for defense," Rea said. The German government is in charge of reconstruction in Kunduz and it funds LAA there. "They see us as a necessary part," asserted Rea. "In Kandahar, the Americans are in charge."

Reserve Army Col. Gary Medvivy who was called up and served in Afghanistan, agrees with Rea.

"A big concern is defense attorneys, they don't exist anymore," said Medvivy, now back in Sonoma County, Calif., where he is a deputy district attorney. When USAID did give funding, an army officer trained some volunteer attorneys in criminal defense, he added. Medvivy thought that LAA might hire some of them.

Medvivy said he worked with the U.S. embassy to establish a one year program at what would be a National Legal Training Center. Its curriculum would combine civil law with religious law and lead to a license, like a bar card, which all attorneys and judges would be required to obtain. The center would be funded by the Italians, and U.S. international narcotics law enforcement, he said. While appreciating the irony of a law enforcement agency training the defense bar, he asserted that funding was difficult and "It was a sell [a way to sell it] in Washington."

There are roughly 500 detainees in U.S. Department of Defense custody in Afghanistan, said Combined Forces Command spokeswoman Lt. Col. Pamela Keeton in an email. Each "has been determined to be a security risk to the government of Afghanistan. [When the Afghan] judicial system meets international criteria for acceptance, in accordance with the Bonn agreement, detainee transfer will be possible." That could happen early this year, said Keeton.

"Tell me how do we explain to the Afghan government that money must be set aside for public defense when the U.S. will not fund public defense during reconstruction," Rea noted.

More Nuts and Bolts

ILF is also helping others learn the nuts and bolts of criminal defense. Medica Mondiale (MM), a German non-governmental organization that provided medical, psychological and primarily civil legal assistance to women and girls in postwar and conflict areas, has added criminal defense of women in Afghanistan to its agenda.

“Afghanistan has never had female defense lawyers,” said Dr. Anou Borrey, MM’s legal program manager in an email from Kabul.

MM had been doing legal outreach and education (funded by USAID), prison work and follow-up of women upon their release from prison. Criminal defense had been outside its area of expertise.

While LAA has represented women charged with crimes and has one woman lawyer, it decided to assist MM rather than compete. ILF has conducted two and Davis will conduct a third training courses for MM lawyers.